JON WINTER & ASSOCIATES,	)	**AGBCA No. 2005-129-2**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

June 20, 2005

Opinion for the Board by Administrative Judge VERGILIO.

On January 19, 2005, the Board received a notice of appeal from Jon Winter & Associates of Santa Rosa, California (contractor), regarding line item 3 of its contract, No. 53-9SCP-04-1K-87, with the respondent, the U. S. Department of Agriculture, Forest Service (Government). The commercial item contract required the contractor to perform wildlife survey work in the Plumas National Forest in California for two seasons. Following a full suspension of work on the line item, after performance had commenced, the contractor seeks to recover an additional $2,800, said to have been incurred prior to a suspension of work. Because of the ultimate termination for the convenience of the Government, the contractor seeks to be reimbursed for its costs incurred. In denying the claim, the contracting officer concludes that the requested costs were not incurred as a result of the termination and that the contractor has not supported any costs as those incurred as settlement expenses involving the termination for convenience.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA). The parties unsuccessfully attempted to resolve the dispute. On April 7, 2005, the Board received the contractor's election to proceed utilizing the Board's small claims procedure, which results in a decision by one judge. The decision is final and conclusive (such that neither party may appeal) and shall not be set aside except in cases of fraud; although it binds the parties, it shall have no value as precedent. 41 U.S.C. § 608; Rule 12.2.

After the election of the small claims procedure, the contractor submitted a complaint with documents supplementing the evidentiary record, the Government submitted an answer, and the parties engaged in discussions with the presiding judge regarding the factual and legal issues. The parties have submitted the case pursuant to Rule 11, without a hearing. The record closed on May 3, 2005, when the presiding judge offered his view of the case while permitting the parties to address the issues and specifics of the proffered analysis.

Under the termination for convenience clause of the commercial item contract, the contractor is to be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the contractor can demonstrate have resulted from the termination. Costs incurred are not the measure of relief under the clause; rather, relief is to reflect the percentage of work performed and reasonable charges that have resulted from the termination. Based upon the record and the clause, the contractor has not demonstrated that the work performed and reasonable charges exceed the payment received. The incurred costs sought do not represent reasonable costs compensable because of the termination for convenience. The contractor is entitled to no additional recovery. The Board denies the appeal.

FINDINGS OF FACT

1. With an effective date of May 5, 2004, the Government awarded a contract to Jon Winter & Associates. Although the contract contains two line items, only one line item is relevant to this dispute--line item 3, for great gray owl surveys at the Bald Mountain location in the Plumas National Forest in California. The contract (used hereafter to refer to line item 3), covering two years, identifies a quantity of 42 stations and a unit price of $10,086 per year, with a line item price of $20,171. (Exhibit 1 at 1, 3; Exhibit 5 at 44.) (All exhibits are in the appeal file.)

2. The contractor is to collect and report on field data as to the presence or absence of the owls within the designated area. Following designated protocol, the contractor is to conduct a complete two-year survey (5 night visits and 1 day visit, each year) for each of the 42 identified calling stations. The contract identifies three phases of work: (1) pre-survey reconnaissance (to gain familiarity with the area and conditions, and to be used to develop a survey plan), (2) field surveys (the actual night surveys and daytime searches), and (3) the documentation of findings (including findings and completed reports). The reports include an interim report (to be completed at the end of the first year) and a written draft final report, and a final report. (Exhibit 1 at 12 (¶¶ D.1, D.2), 13-15 (¶ D.7).)

3. The contract specifies that a pre-work meeting involving the contractor and Government is to be held at a district office prior to the commencement of field work. Further, before field work

begins, the contractor must supply a work plan, with a schedule of survey dates. (Exhibit 1 at 18 (¶ D.14).)

4. Under the contract's Basis for Payment clause, payment will be made according to a specified schedule:

> 1. 20% of the contract price will be paid after completion and acceptance of the pre-survey reconnaissance and the survey plan.
>
> 2. 30% of the contract price will be paid after completion and acceptance by the Government of the first year's surveys.
>
> 3. 30% of the contract price will be paid after completion and acceptance by the Government of all the field surveys.
>
> 4. 20% of the contract price will be paid after completion and acceptance of all contractual obligations including the final report.

(Exhibit 1 at 18 (¶ D.16).)

5. The contract (Exhibit 1 at 1 (¶ 27a), includes the Contract Terms and Conditions--Commercial Items clause, 48 CFR 52.212-4 (OCT 2003), with the following Termination for the Government's Convenience clause:

> The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(Exhibit 1 at 7.)

6. Various weather-caused conditions delayed completing the reconnaissance. The contractor attended the pre-work meeting and conducted the pre-survey reconnaissance in May and mid-June. After the pre-work meeting, at which time the delaying conditions were known and discussed, the parties entered into a no-cost contract modification that did not extend the period of performance, but provided that the contractor would "[m]eet the contract dates as possible accessing the project as

soon as it is 4WD accessible." The first survey was conducted on June 16-17. In reporting on the results of the first visit, by which all call points had been found and marked, the contractor informed the Government that none of the habitat seen in the unit is suitable habitat for the great gray owl. (Exhibit 2; Exhibit 7 at 50-54, 57-60; Exhibit 10.)

7. By July 7, the contractor had made four visits to 24 of the stations (performed by a subcontractor) and two visits to the other 18 stations (performed by the contractor) (Exhibit 8 at 68, 69; Exhibit 10; Exhibit 12 at 81). (The Board is not here asked to determine if surveys conducted in June and July between the hours of 6:00 and 10:00 pm constitute valid night surveys.) For the subcontractor, the time sheets show no lessening or no appreciable lessening of time to perform the surveys with each successive visit; the record reveals no reduction or no appreciable reduction in costs to the contractor with the successive visits. The contractor represents its hours incurred on this contract by month as 21 hours for May, 18 hours for June, and 12.6 hours for July, and a total of 15 hours for administration. These hours are generally unattributed and unsubstantiated in the record, although the start and end times found on the contractor's survey forms indicate that the contractor expended 3 hours 1 minute performing the first survey (in June) and 3 hours 29 minutes performing the second survey (in July). (Exhibits 10-11; Exhibit 12 at 92; Exhibit 13 at 97.)

8. On July 8, 2004, a wildlife biologist suggested to the contracting officer's representative that the line item of the contract be cancelled. By July 9, the contractor was aware of the Government's intent to cancel the Bald Mountain portion of the contract. On July 9 the Government issued a notice of suspension of work. The total suspension of work for the line item has an effective date as of the close of business on July 9, for the stated reason that the habitat has been determined to be unsuitable for the owls being surveyed. (Exhibit 9 at 70.)

9. The parties commenced correspondence attempting to determine payments to be made under the contract; the contractor had not yet invoiced for any payment. On July 12, 2004, the contractor submitted its assessment of its costs incurred up to the time of the suspension: $5,247 (for the subcontractor) and $4,694 (for the contractor), totaling $9,941. In addition to these costs, the contractor states that it qualified for 20% of the contract price when it completed the pre-survey reconnaissance and the survey plan; it seeks half of this 20% amount or $2,017, for a total of $11,958. (Exhibit 11; Exhibit 12 at 88-89; Exhibit 13.)

10. The contracting officer's representative utilized the Basis for Payment clause (Finding of Fact (FF) 4) and the termination clause (FF 5), in concluding that the contractor had earned a total of $7,059.85 derived from two parts representing the percentage of work performed. First is $4,034.20, calculated as 20% of the contract price for the pre-survey reconnaissance and survey plan. Second is $3,025.65, calculated as half (50%) of the first year surveys (30%), or 15% of the contract price; this is based upon the division of work with the subcontractor performing 4 of 6 of its first year surveys and the contractor performing 2 of 6 of its first year surveys, for a total of 6 of 12 surveys, or 50% of the first year surveys. (Exhibit 12 at 88-89.)

11. By letter dated July 20, 2004, the contracting officer's representative indicated to the contractor that the contractor could invoice for $7,059.85 earned up to the stop work order. "Any

'reasonable charges' shall be documented according to the Termination for the Government's Convenience clause." (Exhibit 12 at 91.)

12. Through further correspondence, the contractor continued to maintain that it was entitled to greater reimbursement than that suggested by the Government. The receipts and submissions indicate that the contractor seeks to be reimbursed $9,863, for what it describes as its costs incurred prior to the suspension of work. These costs include billing for time (of the contractor and subcontractor) at a given hourly rate, lodging, mileage, food and equipment, a telephone, and a hearing test. The contractor seeks to be paid $4,616 for its own efforts and $5,247 for those of its subcontractor. (Exhibit 12 at 92-93, 96; Exhibit 13 at 97; Exhibits 14-17, 25.)

13. Under a cover memorandum dated October 11, 2004, the contractor submitted an invoice for $7,059, as suggested by the Government, noting that it would seek an additional $2,804 (Exhibit 15; FF 10). The contracting officer's representative recommended payment of $7,059.85, subsequently approved by the contracting officer. (Exhibit 18.)

14. By letter dated November 10, 2004, the contractor submitted to the contracting officer an invoice to be paid $2,804, an amount said to be owing because of the suspension of work. In part, the letter explains: "I spent a good deal more time on setting up the work needed to complete the contract before the suspension. I feel that these are reasonable costs beyond what has been offered." Further, "I fully expected to be able to do the remaining work more cheaply in year two and even in the remaining visits needed to complete year one. It was getting more efficient as I went on and the visits were taking less time than when I first started." Also,

> There is a learning and experience curve associated with any venture of this sort at first. For these reasons the amount invested into the contract on my part was more than the government offered at the time of suspension of work. I want to recover these costs because I think the costs are reasonable and fairly earned.

(Exhibit 19.) The record belies these conclusions that the survey work was becoming more efficient, or that the incurred costs were declining for the contractor (for its own efforts or those of its subcontractor, given that the time to perform a survey represents a small portion of the charged hours which include travel to and from the site). Although one can assume that the hours and efforts were reasonable, the alleged costs incurred are not reasonable. At the stated hourly rates, given the work performed and to be performed, this contractor would have incurred total costs in excess of the contract price. That is, even assuming that the contractor would have incurred costs for significantly fewer total hours per survey visit for the remaining surveys than those that were completed (for example, one person, not two, could complete a 42-station survey, thereby reducing total hours and associated costs), at the hourly rates, this contractor would incur total costs in excess of the contract price. If the overall contract were completed with work split between two individuals, as occurred prior to the suspension, this contractor would have incurred costs considerably in excess of the contract price. A reduced hourly rate for the contractor (and/or the subcontractor) would be in keeping with the contract price. The stated hourly rates and method of incurring costs are

inconsistent with the contract pricing and do not establish a reasonable basis for compensation. (FF 7; Exhibits 11, 13.)

15. As indicated in the contractor's letter dated December 3, 2004, to the contracting officer, the contractor had received payment of the initially invoiced amount, yet had not received a determination regarding the invoice for $2,804. The contractor stated that it viewed the lengthy suspension as a de facto termination for convenience and that the contracting officer should treat the invoice as a request for an equitable adjustment. (Exhibit 20.)

16. By letter dated January 10, 2005, the contractor filed an appeal with this Board, based upon what the contractor viewed as a deemed denial of its claim to recover $2,800 (Exhibit 21). (The contractor reduced the amount at issue by four dollars.)

17. By letter dated January 18, 2005, the contracting officer issued a determination stating that the line item is terminated for the convenience of the Government. The contracting officer specifies that it has not made a decision on the request for payment of $2,800. However, "it appears you are owed $144.04 for some survey points not paid for. You may submit an invoice for this amount due and I will approve it." (Exhibit 23.) The calculation for the additional $144.04 is based upon the Basis of Payment clause (FF 4), with payment in full for the first item (pre-survey work and survey plan) and a revised percentage of the second item (first-year survey work) (based upon the 132 stations visited compared to the 252 total stations to be visited during the first year) (Exhibit 24).

18. Following communication between the contractor and Government (Exhibit 25), the contracting officer issued a decision denying in full the claim to recover $2,800. The contracting officer concludes that the contractor has provided no rationale of how the claimed costs are a result of the termination for convenience, and has provided no information concerning reasonable charges associated with the settlement of the termination for convenience claim, such as settlement expenses or other costs typically allowed under regulation, 48 CFR 31.205-42, as referenced earlier by the contracting officer in communications between the parties. (Exhibit 26.)

19. The pre-survey work requires a visit to each of the 42 stations. To complete the survey, the contractor must make six visits per year to each of the 42 stations. Thus, overall, the contract requires the contractor to visit 546 stations (42 stations x 13 visits). The contractor visited 174 stations. This is approximately 32% of the work. The contractor made pre-survey visits necessitated by the conditions, but was not required to produce or generate the interim or final reports. Although initial work may entail greater effort than subsequent work, factually, the contractor has not demonstrated that it performed a greater percentage of the contract work than that for which is has been compensated.

DISCUSSION

The contractor seeks to recover its costs said to be incurred, both in performing and in executing the terms of the contract. The contractor maintains that it would have recovered the requested costs, had the contract continued through completion. Because the Government terminated the contract for its convenience, the contractor contends that it was precluded from recouping its incurred costs. The

contractor claims entitlement to the relief under the termination clause. The Government maintains that the contractor has failed to demonstrate that any of the costs the contractor seeks resulted from the termination or that the contractor performed more than 35% of the contract work so as to be entitled the additional relief under the termination for convenience clause.

Under the commercial item termination clause (FF 5),

> the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination.

By approving the payment recommended initially by the contracting officer's representative, and denying the claim for more relief, the contracting officer utilized the payment clause (FF 4) and the number of visits made and to be made by the contractor and subcontractor (FF 10, 13). With this approach, the contractor was paid 20% of the contract price for completing the pre-survey reconnaissance work and a survey plan, and for the 6 of 12 visits envisioned for survey work by the contractor and subcontractor during the first year. This methodology is not automatically in keeping the termination clause because the payment clause does not establish that payment thereunder reflects the percentage of work performed; for example, the pre-survey work, and the post-survey work need not necessarily each represent 20% of the work to be performed, although each percentage serves as a prescribed basis for payment. Further, the contracting officer incorrectly interprets the "reasonable charges" portion of the clause. The language of the clause does not state that charges resulting from the termination must have been incurred subsequent to the termination for convenience; the clause does not expressly limit the additional relief to settlement expenses. The clause permits payment of reasonable charges that have resulted from the termination. A contractor may have reasonably incurred costs in anticipation of performing the entire contract, but those costs may not be fully reflected as a percentage of the work performed. However, the contracting officer provided the contractor with the opportunity to submit information that it was entitled to greater relief under the clause. Also, the contractor has had the opportunity before this Board to demonstrate that it should recover more than it has received.

Initially, the contractor sought reimbursement on a cost reimbursement basis. The clause does not provide for payment utilizing such an analysis. Rather, the contractor is to be paid the percentage of the contract price reflecting the percentage of work performed plus reasonable charges that have resulted from the termination. This contractor claims that its incurred costs represent such compensable reasonable charges. However, the record reveals that these are unreasonable charges in excess of the percentage of the work performed. Most specifically, based upon the existing record, the requested compensation for the contractor's and subcontractor's work reflects billing at an hourly rate that is inconsistent with the contract price. The contractor has not demonstrated the reasonableness of its stated incurred costs in comparison to the contract price and its anticipated expenses. Accordingly, the contractor has not demonstrated that its costs incurred were reasonable under the fixed-price contract.

Viewing the record as a whole, the contractor has failed to demonstrate that it remains undercompensated pursuant to the commercial item termination for convenience clause. In light of the pre-survey and survey work performed, and the unperformed survey work and the compilation and finalization of reports that did not occur, and the stated hours expended and costs incurred, the percentage of work completed multiplied by the contract price when added to reasonable charges the contractor incurred does not exceed $7,059.85, which is 35% of the contract price, as paid by the Government.

Although the contractor states that it is unfair for the contractor to "get stuck with the bill" because of a termination for convenience, the record does not demonstrate that the contractor has been unfairly compensated. If one utilizes an hourly rate for the two individuals that would be consistent with the contract price, the contractor has been fully compensated and is not "stuck with a bill." Under the commercial item termination clause, given the work performed and costs sought, the record supports no additional compensation.

DECISION

The Board denies the appeal.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
June 20, 2005